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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 679

MARKET STREET RAILWAY COMPANY
(a corporation),
Petitioner,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,
Respondents.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Market Street Railway Company, petitioner, and respectfully prays for a reconsideration by the Court of its order entered December 16, 1946, denying certiorari herein, and upon such reconsideration that said order denying certiorari be vacated and writ of certiorari be granted.

It was shown in the petition for writ of certiorari herein that this Court has jurisdiction to review the judgment of the Supreme Court of the State of California entered in this cause on June 18, 1946, whereby your petitioner was ordered to pay to the City and County of San Francisco the sum of $688,751.58 as a condition for the return to petitioner of United States securities of a face value of $600,000 and the exoneration of the surety on petitioner's bond of $100,000. Abundant authority was cited in the petition herein to sustain the jurisdiction of this Court, and no authority has been cited to the contrary.

This is a plain case where the Court below, in the rendition of its final judgment, has construed Sections 67 and 68 of the California Public Utilities Act to empower it to take money legally collected by a public utility as compensation for services rendered by it and to award such money to a municipal corporation which had paid no part of the money and was not acting as the authorized agent, assignee, or trustee of any person who had paid any part of said sum.

Although we believe the construction so placed upon the statute by the California Supreme Court is definitely erroneous, arbitrary and unreasonable, nevertheless, it is our understanding that under a long line of decisions of the Supreme Court of the United States the construction of a state statute and the meaning to be attributed thereto will be considered as binding upon this Court, although it may consider such construction to be erroneous or pure judicial legislation.

Hence, for the purpose of this cause, we must consider the above mentioned sections of the California Public Utility Act, *as so construed,* to have been enacted by the Legislature of the State of California, and the impact of such legislation upon private rights as State action.

In *Ward v. Krinsky,* 259 U.S. 503, this Court said:

> "In the exercise of our appellate jurisdiction we are bound by the construction of the state law adopted by its court of last resort; hence, for present purposes it must be taken as settled that the legislature intended the Compensation Law, as amended, to apply to an employee in Krinsky's situation, precisely as if it were so declared in the words of the statute. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the 14th Amendment upon state action."

The prohibitions of the 14th Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation

by the state, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.

Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226;

Ex parte Virginia, 100 U. S. 339, 346, 347;

Scott v. Neale, 154 U. S. 34.

"But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. *In determining what is due process of law regard must be had to substance, not to form.* This court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U.S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirements of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment."

C. B. & Q. R. Co. v. City of Chicago, 166 U.S. 226.

Your petitioner asserted in its petition for certiorari that the final order and decision of the state Court, purportedly authorized under the California Public Utilities Act as construed by the California Supreme Court, if enforced, will constitute state action by which your petitioner is deprived of its property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Petitioner herein also recognizes the rule of law enunciated in many decisions of this Court that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law.

While recognizing that the application of the foregoing principles affords good ground for the denial of a petition for writ of certiorari in many cases brought before this Court, such principles are not applicable to the case at bar for reasons which we fear have been overlooked by the Court in making the order as to which we request reconsideration.

In our reply brief we considered the contentions of the City and County of San Francisco that our claim of deprivation of property without due process of law was ill founded because the California Supreme Court had found that your petitioner had no property interest in the fares collected by it in excess of the rate ordered by the Railroad Commission. In case our reply brief was not filed in time to receive the consideration of this Court, we repeat what we there said:

Counsel for City and County of San Francisco have contended in their brief (p. 15 and following) that this Court does not have jurisdiction to hear this cause because the Court below found that petitioner was not the legal owner of all fares collected by it while the stay order was in effect, and such determination is conclusive upon this Court.

We, however, contend that such finding or decision of the Court below is not based upon or supported by any substantial evidence, and that, such determination, in view of petitioner's claim of federal right, requires an examination of the record to ascertain if such ground of decision is broad enough or adequate to sustain the decision.

In the brief of City and County of San Francisco it is said (p. 16) that the theme of the present petition for writ of certiorari is that the Court below erred as to the determination of absence of property interest and that therefore the petitioner has been deprived of property without due process of law, and that:

> "There is, of course, no claim of a lack of procedural due process."

In making the statement quoted above counsel for City and County are in error. Petitioner contended in its petition that the ruling of the Court as to the property interest of petitioner in the excess fares is arbitrary and such ruling is unsupported by the evidence. *A decision not based upon substantial evidence is invalid for lack of due process.*

In the petition herein (p. 17) petitioner has urged that the California Supreme Court erred:

1. In holding that petitioner was not the legal owner of all moneys collected by it for the transportation of passengers during the time the operation of the order of the California Railroad Commission was suspended by the order of said Court.

2. In holding that petitioner had no legal ownership in the unclaimed excess charges by reason of a condition inserted in the stay order by the Court over the objections of petitioner, which was not required or authorized by Sections 67 and 68 of the California Public Utilities Act, and in holding that petitioner necessarily accepted the conditions of the order by acceptance of the stay.

The record is devoid of any evidence to sustain the two findings set forth in the specification of errors above quoted.

Where the existence of the alleged federal question itself depends upon a finding of fact, the Supreme Court will examine the facts to see whether the evidence adequately sustains the finding.

King v. Putnam Investment Co., 248 U.S. 23, 39 S.Ct. 15, 63 L.Ed. 102;

Truax v. Corrigan, 257 U.S. 312, 324, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375.

In *Fiske v. Kansas,* 274 U.S. 380, it was held that a state syndicalism act was applied to sustain the conviction of defendant without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts, and that as thus

applied the act was an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the 14th Amendment. It was there said (p. 385):

> "And this court will review the finding of facts by a State Court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." (Cases cited.)

In *Truax v. Corrigan,* 257 U.S. 312, this Court said:

> "In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. *If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here.*"

If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

Davis v. Wechsler, 263 U.S. 22.

The Supreme Court of the State of California has avoided deciding the oft asserted claim of petitioner herein that to take the unclaimed excess charges from it and to award the same to the City and County of San Francisco, or to the State of California, would be to deprive it of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, by the mere statements that "Legal ownership is not a factor appearing in the present case" and "In the stay order it was recognized that the company should be entitled to the additional one cent for each fare collected pending review only if it prevailed and the Commission's order was annulled".

Whether the determination of the question of ownership be regarded as a finding of fact or a conclusion of law, in either event, unless such finding of fact be supported by the evidence in the record, or such conclusion of law be predicated upon a finding of fact supported by evidence, petitioner has not been afforded due process.

This Court has frequently held that it will review the findings of facts by a State Court where the Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U.S. 655, 668.

The rule enunciated above has found expression by this Court in many types of cases. For example, in *Schlem-*

mer v. Buffalo, P. & R. Co., 205 U.S. 1, the case arose under the Federal safety appliance law, and the State Court found that the deceased contributed to his injury by his own negligence, thereby preventing a recovery. This Court exercised the power to examine the evidence, notwithstanding a contention that the finding was conclusive, and reversed the judgment upon the ground that it appeared that what had been found to be contributory negligence was at most an assumption of the risk, which was not a defense under the Federal statute.

Perhaps the most frequent exercise of this power occurs in cases arising under the clause of the Constitution forbidding a State to pass any law impairing the obligation of a contract, *the existence of the contract in such cases being a mixed question of law and fact.* In *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U.S. 683, 697, a leading case upon this subject, it was said:

> "Whether an alleged contract arises from state legislation, or by agreement, with the agents of a state, by its authority, or by stipulations between individuals exclusively, *we are obliged, upon our own judgment, and independently of the adjudication of the state court, to decide whether there exists a contract within the protection of the Constitution of the United States.*"

It is respectfully submitted that when due regard is had for the rule before indicated, and so often applied in so many different types of cases, it does not admit of doubt that in the case at bar this Court should examine the entire record, which includes the only evidence which was received by the Court below, to determine whether

the general finding that petitioner was not the legal owner of the fares collected by it during the pendency of the review proceedings necessarily involved the decision of questions of law bearing upon the right under the Constitution of the United States set up by petitioner herein.

It is of no consequence, as respects the jurisdiction of the Supreme Court of the United States to review a judgment in a proceeding, that it was rendered in an original proceeding in the highest court of a state, and not in a case pending before that court on appeal.

Hartman v. Greenhow, 102 U.S. 672.

In *Hooven & Allison Co. v. Evatt,* 324 U. S. 652, it was said:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. *But when the existence of an asserted Federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained.*" (Cases cited.)

In *Sterling v. Constantin,* 287 U.S. 378, a case where the Governor of the State of Texas sought to deprive citizens of their property by means of the use of military power, it was asserted by the State that a federal court was powerless to intervene to protect civil rights. This Court there said:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United

States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. * * * *Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the Federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of Federal right.''* (Cases cited.)

In the case at bar the state court has sought to prevent a review of its action under a statute, which as construed by such court, permits the property of petitioner to be taken without due process of law, by the simple expedient of declaring that your petitioner was not the legal owner of the fares collected by it because it (the court) did not want petitioner to become the legal owner of such fares.

A review of the facts of record in the case at bar should be made by this Court, as stated in the foregoing case, for the purpose of determining whether there is any substantial evidence to support the determination as to legal ownership by the state court. We submit there is none.

Such determination is necessary for this Court to pass upon the Federal question.

By the decision of the State Court, money, which had been paid to your petitioner by its passengers in excess of the rate prescribed in the order of the Railroad Commission while said order was suspended pending judicial review, and which was unclaimed by the passengers paying the same, is required to be paid over to the City and County of San Francisco as a condition for the exoneration of your petitioner's stay bond, and the return to it of its securities.

By the decision of the State Court a non-statutory condition for the exoneration of a statutory bond is imposed upon petitioner. The suspending bond during pendency of writ of review which was furnished by petitioner in accordance with the requirements of the order of the California Supreme Court dated March 8, 1944, appears in the original record transmitted to this Court at page 178 thereof, although it was omitted by the Clerk of this Court in printing the record. This $100,000 bond was executed by Seaboard Surety Co., as surety, and the condition for liability of said surety is fixed in the bond as follows:

> "Now, Therefore, the condition of this obligation is such that if the above named Market Street Railway Company, a corporation, shall promptly pay or cause to be paid all damages caused by the delay in the enforcement of said decision and order of the Railroad Commission and all moneys which any person or corporation may be compelled to pay for transportation over the facilities of said Market Street Railway Company in the City and County of San

> Francisco pending the review proceedings, in excess of the charges fixed by said decision and order of the Railroad Commission in case said order and decision is sustained, then this obligation to be void; otherwise to remain in full force and effect."

This statutory stay bond follows the language of Section 68(d) of the California Public Utilities Act. (See Appendix, Petition for Certiorari.) It contains no provision that petitioner herein shall pay any money to the City and County of San Francisco, nor does the statute under which it was given require the payment by your petitioner of any money to the City and County of San Francisco or to any person or corporation other than the persons or corporations paying such excess charges. Section 68(e) of the Act provides in part that:

> "Upon the final decision by the Supreme Court, all moneys which the public utility may have collected, pending the appeal in excess of those authorized by the order or decision of the Commission, together with such interest as may be reasonable, shall be promptly paid to the corporations or persons entitled thereto in such manner and through such methods of distribution as may be prescribed by the court, should the Commission order or decision be upheld."

No money judgment was rendered against petitioner herein. The order of the California Supreme Court is that upon receipt by the Clerk of said Court of a cashier's check in the sum of $688,751.58, payable to the City and County of San Francisco, the clerk is directed to deliver to petitioner the securities deposited by petitioner, and that the surety on its bond of $100,000 shall stand exonerated.

For the reason that there appears to be no liability on the part of petitioner's surety under the statutory bond furnished by petitioner to pay any money to the City and County of San Francisco in the event that petitioner fails to pay the amount required by said order, it is urged that this fact demonstrates the arbitrary nature of the order made by the State Court by which petitioner is deprived of its property without due process of law.

In order that further litigation be avoided, it is respectfully urged that this Court reconsider its order denying petitioner's petition for certiorari, and that the petition be granted.

In conclusion, it is respectfully submitted that the final order of the California Supreme Court is arbitrary and unjust, and that the California Public Utilities Act, which has been construed by said Court as authorizing it to take the property of petitioner and to award the same to a municipal corporation, is in violation of Section 1 of the 14th Amendment to the Constitution of the United States. Therefore, we pray that the order of this Court entered December 16, 1946, denying certiorari be vacated and upon reconsideration that the writ of certiorari issue.

Dated, San Francisco, California,
January 3, 1947.

Respectfully submitted,
CYRIL APPEL,
IVORES R. DAINS,
Counsel for Petitioner.